90-411

Supreme Court, U.S.
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NO. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

TRINITY INDUSTRIES, INC., TANK LINING AND REPAIR CAR COMPANY, AND CENTRAL MAINTENANCE, INC.

Petitioners,

vs

ELIZABETH DOLE, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Robert E. Rader, Jr.
David P. Blanke
A. Darby Dickerson
LOCKE PURNELL RAIN HARRELL
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8000

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

The issue in this case is whether OSHA may expand limited scope complaint inspections under § 8(f) of the Occupational Safety and Health Act, 29 U.S.C. § 657(f), into comprehensive plant-wide inspections under § 8(a) of the Act, 29 U.S.C. § 657(a), without first demonstrating that the establishment was selected for inspection based on a reasonable administrative inspection plan, as required by *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978).

PARTIES TO PROCEEDING IN COURT BELOW

Trinity Industries, Inc., and two of its subsidiaries, Tank Lining and Rail Car Company and Central Maintenance Inc., challenged administrative subpoenas duces tecum in the United States District Court for the Western District of Pennsylvania. The District Court's action was then reviewed by the United States Court of Appeals for the Third Circuit. All three of these parties join as petitioners to this Court. The Secretary of Labor also was a party to the proceedings below.

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Petitioners,

vs

ELIZABETH DOLE, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners Trinity Industries, Inc., Tank Lining and Repair Company, and Central Maintenance, Inc. (collectively, "Trinity") respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on June 7, 1990.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (*see*, App. A *infra.*) is reported at 904 F.2d 867.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was rendered on June 7, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Title 29 U.S.C. § 657(a) reads, in pertinent part:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place or employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Title 29 U.S.C. § 657(b) reads, in pertinent part:

> In making his inspections and investigations under this chapter the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. . . . In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

Title 29 U.S.C. § 657(f) reads, in pertinent part:

> (1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. . . . If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. . . .

STATEMENT OF THE CASE

In early 1989, the Occupational Safety and Health Administration ("OSHA") received a complaint from an employee at Trinity's Butler, Pennsylvania plant. The complaint stated that hard hats and safety glasses were not provided to non-production employees who walked through the shop

areas. Based on this information, OSHA obtained a warrant to conduct a special inspection under § 8(f) of the Occupational Safety and Health Act (the "Act"), 29 U.S.C. § 657(f). However, the boiler-plate form warrant also authorized OSHA officials to conduct an expanded inspection of all illness and injury records maintained by Trinity pursuant to 29 C.F.R. §§ 1904 and 1910. The purpose for reviewing all these records was to compute Trinity's Lost Workday Incidence Rate (LWDI) to justify an expanded, comprehensive inspection. Trinity was willing to permit an inspection limited to the complaint, including an inspection of any records relating to the complaint. Trinity objected, however, to producing records beyond the scope of and not related to the complaint.

On March 21, 1989, after Trinity had refused to allow an inspection of all the records sought, the Secretary of Labor (the "Secretary") served Trinity with administrative subpoenas duces tecum demanding production of all accident and illness records, as well as various payroll and production records. These documents were essentially the same as those listed in the warrant. The Secretary acknowledged her purpose for subpoenaing the records was to compute Trinity's LWDI in order to justify expanding the complaint inspection to a comprehensive plant-wide inspection. On March 30, 1989, Trinity informed OSHA that it would not comply with the subpoenas because the records sought exceeded the scope of the complaint. On May 16, 1989, the Secretary petitioned the district court to enforce the administrative subpoenas. Trinity moved the district court to dismiss the Secretary's petition because the same issue — whether the Secretary is entitled to Trinity's accident and illness records — was pending before the Occupational Safety and Health Review Commission (the "Review Commission"), and because the Secretary was required to exhaust administrative remedies in accordance

with the Third Circuit's holding in *Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128 (3d Cir. 1979). The district court ordered that the subpoenas be enforced, but only to the extent that the documents sought pertained to the employee complaint. The Secretary then appealed to the Third Circuit.

While this case was before the Third Circuit, an administrative law judge with the Review Commission ruled that Trinity was required to produce only those records related to the employee complaint. *Secretary of Labor v. Trinity Industries, Inc.*, Occupational Safety and Health Review Commission Case No. 89-1158, typescript at 7. (OSHRC Feb. 22, 1990). The Third Circuit held otherwise. More particularly, the Third Circuit found that:

> These subpoenas were issued in connection with a limited workplace inspection following an employee complaint, but the information they seek does not have to be relevant to that particular inquiry in order to justify full enforcement. It is enough that the information sought is relevant to any inquiry that the Secretary is authorized by law to undertake.

904 F.2d at 874.

REASONS THE WRIT SHOULD BE GRANTED

A. A Search Under § 8(f) of the Act Must Be Confined to the Complained of Conditions

OSHA is authorized to conduct two types of inspections under the Act. First, under § 8(a) of the Act, 29 U.S.C. § 657(a), OSHA conducts "programmed" inspections; that is, those inspections not based on any specific event or reason

to believe there may be violations in the workplace. These inspections "usually are done pursuant to some sort of general administrative plan." *Marshall v. North American Car Company*, 626 F.2d 320, 322 (3rd Cir. 1980). Second, under § 8(f) of the Act, 29 U.S.C. § 657(f)(1), OSHA conducts "special inspections." These inspections "are the result of an employee complaint." *North American Car Company*, 626 F.2d at 322.

In *Marshall v. Barlow's Inc.*, 436 U.S. 307, 324-25 (1978), this Court held that nonconsensual OSHA inspections pursuant to either § 8(a) or § 8(f) require a warrant. In doing so, though, the Court also recognized that the showing of probable cause would vary, depending on whether the inspection was triggered by a complaint or prompted by a general administrative plan:

> Probable cause in the criminal law sense is not required. For purposes of an administrative search . . . , probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular [establishment]." [Citation and footnote omitted.]

Id. Accordingly, there are two alternative bases for establishing the requisite probable cause: the first being a "showing that a specific business has been selected for a search on the basis of a general administrative plan under 8(a)"; and the second requiring "specific evidence of an existing violation at the workplace under 8(f)." *Donovan v. Blue Ridge Pressure Castings, Inc.*, 543 F. Supp. 53, 57 (M.D. Pa. 1981); *see also Marshall v. Horn Seed Company, Inc.*, 647 F.2d 96, 100 (10th Cir. 1981). Identifying the type of inspection is essential since the nature of the probable cause will vary depending upon whether the inspection is

sought pursuant to § 8(a) or § 8(f). *Blue Ridge Pressure Casting, Inc.*, 543 F. Supp. at 57. The Tenth Circuit has described the distinction:

> In the context of routine, periodic inspections of several sites randomly selected pursuant to a general legislative or administrative plan [under § 8(a)], the Court has repeatedly held that showing of reasonableness does not depend upon a demonstration of probable cause that a particular dwelling contains violations of the regulatory standards being enforced. . . . When a warrant is sought to conduct an inspection according to a general administrative plan, it is reasonable that the magistrate not be concerned with questions of the reliability of evidence and the probability of violation. The reasonable balance between the need to search and the threat of disruption has already been struck by the legislative and administrative guidelines.
>
> * * * *
>
> These safeguards are not built in when a search is based on a specific complaint [pursuant to § 8(f)]. In such instances, the government is not inspecting on the basis of neutral criteria derived from reasonable legislative or administrative standards. Unless it is possible to infer that the complaint was actually made and that it has some modicum of plausibility to it, the danger of arbitrary invasions by government officials exists. . . . Without some sort of scrutiny of the reliability of the "specific evidence" serving as probable cause for an OSHA warrant, no real assessment of the need to search can be made.

Marshall v. Horn Seed Company, Inc., 647 F.2d 96, 100-01 (10th Cir. 1981).

Identifying the type of inspection is also critical in determining its permissible scope. The initial sentence of § 8(f) provides that employees may notify the Secretary of a particular "violation or danger." Under the third sentence of § 8(f), the Secretary is then charged with the responsibility to determine if there is reasonable cause to believe that such violations exist and then conduct an inspection "to determine if such violation or danger exists." As the Third Circuit observed, "[i]t would seem that the use of this phrase twice in the third sentence is meant to be a reference back to the initial violation brought to the Secretary's attention by the employee." *North American Car Co.*, 626 F.2d at 323. Accordingly, "both the Secretary's decision to inspect and the actual purpose of the inspection are geared toward the allegations in the employee's complaint." *Id.* Therefore, the Third Circuit "h[e]ld that where an OSHA inspection is conducted under § 8(f) pursuant to an employee complaint, the scope of the inspection must bear an appropriate relationship to the violations alleged in the complaint." *Id.* at 324. This accords with the Fourth Amendment axiom that a search warrant must be tailored to the probable cause for its issuance, so that the invasion of the subject's privacy is minimized. *Michigan v. Tyler*, 436 U.S. 499, 508 (1978). *See also Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1068 (11th Cir 1982) ("a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint."); *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719, 720 n.1 (8th Cir. 1979); *In re Establishment Inspection of Asarso, Inc.*, 508 F. Supp. 350, 353 (N.D. Tex. 1981). Courts have repeatedly observed that any inspection of records during a § 8(f) search must be confined to the complained of conditions. *See Blue Ridge Pressure Castings, Inc.*, 543 F. Supp. at 61 ("In view of the limitations inherent in a § 8(f) search, we find that the [employer] need only allow

OSHA to inspect the records of those employees [working in areas specified in the employee complaint]. . . ." [footnote omitted]); *compare Marshall v. W and W Steel Company,* 604 F.2d 1322, 1326-27 (10th Cir. 1979) (approving review of records limited to part of the plant that was the subject of the complaint); *U.S. v. Establishment Inspection of: Jeep Corp.,* 836 F.2d 1026, 1028 (6th Cir. 1988) ("The warrant limited the inspection of records to those 'which are directly related to the purpose of this inspection.' We do not believe this to be overbroad.").

B. The Secretary May Not Employ An Administrative Subpoena To Evade The Scope Limitations Under § 8(f) of the Act

The requirements for the enforcement of an administrative subpoena duces tecum were set forth by this Court in *United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950). They are as follows: (1) the inquiry must be "within the authority of the agency," (2) the demand for production must not be "too indefinite", and (3) the information sought must be "reasonably relevant." *Id.* at 652. The Third Circuit concluded that the third prong of the *Morton Salt* standard was satisfied so long as the "information [sought is] relevant to *some* (any) inquiry that the Secretary is authorized to undertake". 904 F.2d at 872 [emphasis in original.]. Under this interpretation, the Court found the subpoena proper because the "Secretary is authorized under § 657(a) of the Act to review the safety and health records of employers, and she is authorized under § 657(b) to subpoena the records if they are not otherwise forthcoming." 904 F.2d at 872-73.

The Third Circuit's application of the *Morton Salt* test emasculates the statutory distinction between inspections under § 8(f) and § 8(a) of the Act, as well as the holding in *Barlow's.* As noted above, § 8(f) of the Act limits complaint

inspections to the determination of whether the complained of violation exists. This accords with the Fourth Amendment principle that a search warrant must be tailored and limited in scope to avoid any greater invasion of privacy than is necessary. *Tyler*, 436 U.S. at 508. The proper scope of an inspection under the Act and under the Fourth Amendment depends on *what triggered the inspection*. Here, the inspection was triggered by a complaint. Thus, the inspection of Trinity's premises and records must, under the Act and the Fourth Amendment, be limited in scope to the complaint. If the Secretary may subpoena *all* of Trinity's records and then use those records to "bootstrap" a showing of probable cause for an unlimited, comprehensive inspection, then the limitation of § 8(f) is meaningless. Moreover, *Barlow's* requirement that the Secretary show that an employer has been selected based on "reasonable administrative standards" in order to conduct a plant-wide inspection under § 8(a) is nullified. In this case Trinity was clearly *not* selected based on reasonable administrative standards, or OSHA's inspection plan. Trinity was selected because of the complaint. The Secretary is not subpoenaing the records of *all* high hazard businesses, and there is no administrative plan for selecting which companies' records will be subpoenaed. To paraphrase the Tenth Circuit in *Horn Seed*, there are no safeguards or neutral criteria to limit and guide when a complaint will result in subpoenas for records to justify expanding the search. It is a purely arbitrary decision by the Secretary. The Secretary, by use of an administrative subpoena is, in effect, making an "end run" around the limitations of § 8(f) of the Act, the Fourth Amendment, and the Court's holding in *Barlow's*.

To put it another way, the Third Circuit's application of *Morton Salt* effectively eliminates the Secretary's burden to demonstrate probable cause under § 8(a). In the past, to demonstrate probable cause it was incumbent upon the Secretary to demonstrate that neutral criteria had prompted the employer's selection for such a broad, intrusive inspection. *See Horn Seed Co.*, 647 F.2d at 100-01. These neutral criteria were an employer's assurance against arbitrary invasion. *Id.* The Third Circuit, however, has eliminated these protections for employers in heavy industry. Now the Secretary may, following an employee complaint, simply subpoena documents which bear on safety or work conditions, thereby intruding more extensively into the employer's place of business than § 8(a) would allow. *See Matter of Inland Steel Co.*, 492 F. Supp. 1310, 1315 (N.D. Ind. 1980) (records review beyond the scope of § 8(a) inspection). She may then use those records to calculate the employer's LWDI, and "if that rate is at or above the Bureau of Labor Statistics' lowest average national rate for manufacturing over the past five years," she may expand "the scope of the inspection . . . to a general inspection of the workplace." 904 F.2d at 867. Not suprisingly, the LWDI for heavy industries, such as those in which Trinity is engaged, routinely exceeds the national average for *all* manufacturing. *See* Appendix B. Thus, the Secretary will be able to expand the scope of a § 8(f) inspection to that of a § 8(a) inspection in virtually every case, without ever having to demonstrate that the comprehensive inspection target was *selected* based on a reasonable administrative plan as required by *Barlow's*. *See also Sarasota Concrete Co.*, 693 F.2d at 1068.

CONCLUSION

This case differs from *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984). In *Lone Steer*, the Court upheld the Secretary's use of the subpoena power because there was no question of "entry." *Id.* at 408-09. Here the sole, acknowledged purpose of the Secretary's subpoena is to obtain information to "bootstrap" a showing of probable cause for a comprehensive search. If this tatic is allowed, the statutory distinction between § 8(a) and § 8(f) of the Act, and the constitutional protections affirmed in *Barlow's*, will be nullified.

For the foregoing reasons, petitioners respectfully request this Court to issue a writ of certiorari to review the opinion of the Third Circuit, and upon review to reverse the holding of the court below and hold that where a business is selected for inspection under § 8(f) or the Act, the Secretary may not use administrative subpoenas to explore company records for probable cause to expand the inspection.

Respectfully submitted,

Robert E. Rader, Jr.
David P. Blanke
A. Darby Dickerson
LOCKE PURNELL RAIN HARRELL
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201
(214) 740-8000

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to John R. Shortall, U.S. Department of Labor, Office of the Solicitor, 200 Constitution Ave., N.W., Washington, D.C. 20210, on this _____ day of September, 1990.

_____

Robert E. Rader, Jr.

APPENDIX A

Filed June 7, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-3625

ELIZABETH DOLE, SECRETARY OF
LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

TRINITY INDUSTRIES, INC.,
TANK LINING AND REPAIR CAR COMPANY,
AND CENTRAL MAINTENANCE, INC.,
and their successors

U.S. SECRETARY OF LABOR,
Appellant

On Appeal from the United States District
Court for the Western District of Pennsylvania
(D.C. Civil Action No. 89-1059)

Argued April 3, 1990

Before: HIGGINBOTHAM, *Chief Judge*,
COWEN and NYGAARD, *Circuit Judges*.

(Filed June 7, 1990)

JOHN J. SHORTALL, ESQ. (Argued)
ROBERT P. DAVIS, ESQ.
Solicitor of Labor
CYNTHIA L. ATTWOOD
Associate Solicitor
for Occupational Safety and Health

ANN ROSENTHAL, ESQ.
Counsel for Appellate Litigation
U.S. Department of Labor
Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Counsel for Appellant

ROBERT E. RADER, JR., ESQ. (Argued)
A. DARBY DICKERSON, ESQ.
Locke Purnell Rain Harrell
2200 Rose Avenue, Suite 2200
Dallas, TX 75201-6776

MARVIN A. FEIN, ESQ.
Baskin Flaherty Elliott & Mannino
2900 One Mellon Bank Center
Pittsburgh, PA 15219

Counsel for Appellees

OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Chief Judge*.

This case comes to us as an appeal from a final order of the district court granting limited enforcement of administrative subpoenas duces tecum issued by the Secretary of Labor under the Occupational Safety and Health Act, 29 U.S.C. §§ 651-78 (1982). The subpoenas ordered Trinity Industries, Inc. and two of its subsidiaries to produce occupational health and safety records that they are required by law to keep. The Secretary, who brought the case in district court when the companies refused to comply with the subpoenas, claims on appeal that the district court used an incorrect legal standard in granting only limited enforcement. We agree.

I.

On February 10, 1989, the Occupational Safety and Health Administration ("OSHA") received a formal written complaint from an employee at the Butler workplace where Trinity Industries, Inc. ("Trinity") repairs railroad cars. Specifically, the employee alleged that "[n]o hard hats and safety glasses [were] provided for non-production employees when walking through the shop work areas." Appendix ("App.") at 10. Under section 8(f) of the Act, 29 U.S.C. § 657(f)[1], such a complaint can, and in this case did, trigger an inspection of the conditions described. OSHA obtained a warrant under 29 U.S.C. § 657(a)[2], which

1. Title 29 U.S.C. § 657(f) reads, in pertinent part:

> (1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. . . . If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. . . .

2. Title 29 U.S.C. § 657(a) reads, in pertinent part:

> In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized--
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner,

authorized an inspection of the plant limited to the conditions described in the employee complaint. The warrant also authorized "the inspection (and copying if it is deemed necessary by the inspecting Compliance Officer) of records required to be maintained by 29 U.S.C. 657(a) and 29 CFR Part 1904 and 1910, with the exception of [employee medical records]."[3] App. at 20; Appellant's Brief at 10.

Trinity did not honor the warrant. Trinity now claims that it "was willing" to allow a plant inspection limited to the conditions described in the employee complaint and a review of records of injuries that may have resulted from those specific conditions, but it would not permit a more extensive review of its records. Appellees' Brief at 3. The Secretary, on the other hand, contends that Trinity would permit neither the limited inspection of the workplace nor the examination of any records. On March 21, 1989, OSHA issued an administrative citation to Trinity for having refused to produce the records and proposed a penalty of $3000.

At the same time that it issued the citation, OSHA served an administrative subpoena duces tecum on Trinity and identical subpoenas on two of its subsidiaries, Tank Lining and Rail Car Co. and Central Maintenance Co. The subpoenas, which were

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any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

3. The warrant authorized inspection of a log and summary of occupational injuries and illnesses and an annual summary of such injuries and illnesses. Title 29 C.F.R. § 1904.7 (1989) requires each employer to make available accident and injury records for inspection and copying by the Secretary.

authorized under 29 U.S.C. § 657(b)[4], requested of all three companies much of the same information requested of Trinity by the warrant, and some additional information.[5] In her petition filed in

4. Section 657(b) reads, in pertinent part:

> In making his inspections and investigations under this chapter the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. . . . In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

29 U.S.C. § 657(b).

5. The subpoenas requested the following information for the years 1987 through 1989, inclusive:

> 1. Any and all documents, books, and/or records containing information regarding the number of employees and the number of hours worked by said employees . . . , including but not limited to time cards, time card summaries, payroll records, Occupational Safety and Health Administration Form OSHA 200-s, and/or employee lists or rosters . . . .
>
> 2. Any and all documents, books, and/or records containing information regarding the amount of lost employee worktime due to injury or illness . . . , including but not limited to logs and/or summaries of employee injuries, illness, or fatalities, worker's compensation records and reports, and/or sick leave records . . . .
>
> 3. Any and all Employer's First Reports of Occupational Injury for each lost time injury . . . .

district court to enforce the subpoenas, the Secretary explained that the information was needed to determine whether the scope of the inspection should be enlarged. OSHA's internal instruction handbook requires that OSHA expand the scope of a workplace inspection conducted pursuant to an employee's formal complaint if the employer meets a specified criterion. The inspector is instructed to calculate the company's lost workday incidence ("LWDI"), and if that rate is at or above the Bureau of Labor Statistics' lowest average national rate for manufacturing over the past five years, then the scope of the inspection is to be expanded beyond the conditions listed in the employee complaint to a general inspection of the workplace.

On March 27, 1989, Trinity filed a notice with the Occupational Safety and Health Review Commission ("Review Commission") contesting the citation and proposed penalty that had resulted from its failure to honor the warrant.[6] Several days later, on March 30, counsel for Trinity and its subsidiaries notified OSHA that they would not comply with the subpoenas. The Secretary then filed a petition in district court to enforce the subpoenas. The district court ordered enforcement limited to those records that relate to the workplace conditions described in the complaint, and the Secretary appealed, claiming that full enforcement should have been ordered.

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4. Any and all Occupational Safety and Health Administration Forms 101 and 200 . . . .

App. at 15-20.

6. Since this appeal was filed, an administrative law judge ruled that in response to the warrant issued under 29 U.S.C. 657(a), Trinity was required to produce only those records related to the employee complaint. *Secretary of Labor v. Trinity Industries, Inc.*, Occupational Safety and Health Review Commission Case No. 89-1158, typescript at 7. (OSHRC Feb. 22, 1990).

II.

We have jurisdiction to review a final order of the district court under 28 U.S.C. § 1291 (1982 & Supp. V 1987). The district court assumed jurisdiction, pursuant to 28 U.S.C. § 1331 (1982), over a question of federal law under the Act. We have jurisdiction, indeed we have an obligation, to review the district court's assumption of jurisdiction. "An appellate court must satisfy itself not only of its own jurisdiction, but also of the jurisdiction of the courts under review." *Pomper v. Thompson*, 836 F.2d 131, 132 (3d Cir. 1987) (citing *Mitchell v. Maurer*, 293 U.S. 237 (1934)). Our standard of review in this matter is plenary. *York Bank and Trust v. Federal Savings and Loan Ins. Corp.*, 851 F.2d 637 (3d Cir. 1988); *Medical Fund-Philadelphia Geriatric Center v. Heckler*, 804 F.2d 33, 36 (3d Cir. 1986).

Trinity and its two subsidiaries ("Trinity et al."), raise an issue of jurisdiction on appeal, and we shall consider this threshold question first. Their argument is based on their claim that "[t]he exact issue raised in the Secretary's appellate brief is presently pending before the Occupational Safety and Health Review Commission," namely, the scope of records inspection authorized under the Act in response to an employee's complaint. Appellee's Motion to Dismiss at 1. They contend that, once the administrative review process to decide this question has been set in motion by the Secretary's contempt citation and Trinity's contesting of the citation, the process must be completed before the district court has jurisdiction to review the case. They make the novel argument that, under the Act, not only employers but also the Secretary of Labor must exhaust administrative remedies before presenting the question in district court; they contend that her failure to do so creates a jurisdictional defect. Therefore, they conclude, the

district court lacked jurisdiction to consider the question, and this court lacks jurisdiction to hear the appeal, since at the time the case was filed the question was still pending before the Review Commission.

We disagree with Trinity's contention that the primary issue in the two proceedings is the same. Because of that, we do not reach the question whether the Secretary was required to exhaust administrative remedies before approaching the district court, nor do we consider whether her failure to do so was jurisdictional. The question before the administrative law judge was one of the proper scope of the inspection of an employer's records under a warrant issued pursuant to 29 U.S.C. § 657 (a) in response to an employee complaint. The question before the district court was one of the proper scope of the inspection of an employer's records under an administrative subpoena issued pursuant to 29 U.S.C. § 657 (b) in response to an employee complaint. Trinity et al. conflate these two questions. Their approach assumes that under the Act the two instruments, the warrant and the administrative subpoena, are the same with respect to their authority to require the production of records in response to an employee complaint. Under the law of this circuit, this is clearly not so. *In the Matter of Kulp Foundry, Inc.*, 691 F.2d 1125 (3d Cir. 1982).

In *Kulp Foundry*, a case very similar to this one, we held that, under the Act, the Secretary could require the production of the employer's records but only by subpoena and not by warrant. *Id.* at 1132. In response to a formal written employee complaint alleging that employees were exposed to "high levels of dust," OSHA applied for a warrant to inspect "all pertinent conditions, structures, machines, apparatus, devices, equipment, materials and all

other things therein (including records, files, papers, processes, controls and facilities) bearing on whether this employer is complying with the Occupational Safety and Health standard for exposure to silica." *Id.* at 1127. Kulp failed to honor the warrant and the district court held the company in contempt for refusing to allow the inspection of the workplace; however, the court quashed and severed as overly broad that portion of the warrant which authorized the Secretary to inspect documents at the plant. The district court held that the only statutory authority for the inspection of documents under the Act was the Secretary's administrative subpoena power under section 8(b) of the Act, 29 U.S.C. § 657(b). *Id.* at 1131. This court affirmed the district court's order, holding that the Secretary was without statutory authority to inspect documents pursuant to a search warrant issued under § 657(a). We said:

> Our reading of the statutory provisions, the legislative history, and the various policies behind the Act convinces us that Congress did not intend to allow the Secretary to inspect records pursuant to a warrant issued under section 8(a). Congress clearly distinguished inspections of an employer's physical plant from the examination of records and documents. . . . We conclude . . . that Congress intended the safeguards of a subpoena requirement to apply to the production of documents.

Id. at 1132 (footnote omitted).

Because, under the law of this circuit, subpoenas and search warrants differ in their power to require the production of records in response to an employee complaint, the question that was before the Review Commission is different from the question that was before the district court and is before us on appeal. The issue of exhaustion of administrative remedies

therefore does not arise in this case. The district court had jurisdiction to hear the case and we have jurisdiction to hear the appeal.

III.

We now turn to the substantive issue raised by the Secretary on appeal: whether the district court erred in limiting enforcement of the administrative subpoenas to those records related to the conditions described in the employee complaint.

The requirements for the enforcement of an administrative subpoena duces tecum were set forth by the United States Supreme Court in *U.S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) and restated by this court in *U.S. v. Westinghouse Electric Corp.*, 638 F.2d 570, 574 (3d Cir. 1980). They are as follows: "(1) the inquiry must be within the authority of the agency, (2) the demand for production must not be too indefinite, and (3) the information sought must be reasonably relevant to the authorized inquiry." *Westinghouse Electric*, 638 F.2d at 574.

In the hearing on a rule to show cause why a petition to enforce the subpoenas should not be issued, the district court found that the government had met the first two of these requirements: the type of inquiry was within the authority of the agency and the demand for production was not too indefinite. However, it found that the government had failed to meet the third requirement. The following colloquy on this point occurred between the court and counsel for the Secretary at the hearing:

> THE COURT: The most important [requirement], however, is the third in this case, and that is that the information is reasonably relevant to the authorized inquiry.
>
> . . .

> . . .[Y]ou had an employee who made a complaint; . . . that there weren't hard hats and goggles for employees walking through the work area? Now, you should have gotten a warrant under 8F; then you would be entitled to subpoena information that is relevant to that complaint. I don't care what you have in your procedure manual. You can put anything you want in your procedure manual, . . . but you don't have the authority to get that.
>
> MS. GWYNN: Well, Your Honor, our position is that we are entitled to subpoena this information whether we have a complaint or not. We are --
>
> THE COURT: Well, I don't agree with that position.
>
> MS. GWYNN: We are entitled to obtain information about health and safety records at a work site.
>
> THE COURT: I don't agree. . . .

App. at 99-101.

The court held that the Secretary was entitled to subpoena only those records that related to the employee complaint. It did not accept as legitimate OSHA's procedure of investigating an employer's overall health and safety record by calculating the LWDI whenever it conducted an inspection in response to an employee complaint.

We believe that some confusion may have resulted in this case from the fact that OSHA was undertaking two separate inquiries. The first was an inspection of the workplace, limited to the conditions described in the employee complaint. The second was a general review of the employer's health and safety records to see whether its LWDI called for a broader inspection of the workplace. The complaint inspection triggered the second, more general inquiry. The records that the

Secretary subpoenaed were reasonably relevant to the second inquiry but not to the first.

The difference between the positions of the Secretary and the district court, as reflected in the colloquy, is in their interpretations of the third requirement listed in *Westinghouse Electric*, that the information sought must be "reasonably relevant to the authorized inquiry." *Westinghouse Electric*, 638 F.2d at 574. Does it mean, as the district court seemed to think, that the information must be reasonably relevant to a particular authorized inquiry, in this case the investigation of an employee complaint? Or does it mean merely that the information must be relevant to *some* (any) inquiry that the Secretary is authorized to undertake? We hold that the latter is the correct interpretation.

The Supreme Court, in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943), held that where the Secretary of Labor sought enforcement of administrative subpoenas, and the information sought by the subpoena "was not plainly incompetent or irrelevant to *any* lawful purpose of the Secretary . . . , it was the duty of the district court to order its production . . . ." *Id.* at 509 (emphasis added). It is well established that, "[w]hen investigative . . . duties are delegated by statute to an administrative body, it . . . may take steps to inform itself as to whether there is probable violation of the law." *Morton Salt*, 338 U.S. at 643. The court explained at some length the investigative power of administrative agencies:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with

> seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Id. at 642-43.

The Secretary is authorized under § 657(a) of the Act to review the safety and health records of employers, and she is authorized under § 657(b) to subpoena the records if they are not otherwise forthcoming. The remaining question is whether she may undertake such general reviews in response to employee complaints.

In their brief and at oral argument, Trinity et al. claimed that the Secretary's motive in seeking to subpoena the documents was improper. They characterized the Secretary's efforts to obtain the documents by subpoena as an illegitimate attempt to do "indirectly" what she could do not "directly" and as an "end run" around the restrictions of the warrant. We fail to understand this characterization of requests for documents under an administrative subpoena. Under the rule of *Kulp*, it appears that the Secretary was in error in requesting any documents by warrant. That certainly did not mean that she was in error in requesting documents by subpoena. In fact, the direct and proper way for her to obtain the documents she sought was by administrative subpoena.

Furthermore, we find that OSHA's policy of reviewing an employer's records to determine its LWDI in response to an employee complaint of unsafe conditions is entirely appropriate. Appellees do not dispute that OSHA is entitled to subpoena the

documents in question in order to calculate an employer's overall safety record when this action is not in response to an employee complaint, but they would have us hold that it cannot subpoena them following an employee complaint. Given that the primary purpose of the Act is to protect employees from death and injury due to unsafe working conditions, *see Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977), we can find no basis for Trinity's position. An employee complaint is just the sort of thing that would reasonably cause OSHA to "take steps to inform itself as to whether there is probable violation of the law" beyond the conditions cited in the complaint. *Morton Salt*, 338 U.S. at 643.

In arguing that the district court's decision should be upheld, Trinity et al. seem to equate the Secretary's action in requiring production of the records with a "wall to wall" inspection of the workplace. Requiring that an employer produce for the Secretary's inspection records that by law he must keep for her use is hardly equivalent to undertaking a comprehensive plant inspection; requiring the production of the documents does not even, by itself, trigger such an inspection. It is the employer's own safety record that would do that, and then only if, after inspecting the documents, the Secretary determined that the employer's safety record fell below a certain level. If Trinity did not consent to a broader inspection of the workplace, the Secretary would have to obtain a warrant.

Trinity et al. cite numerous cases in support of their position that the district court's decision should be upheld, but none of them is on point. Some of these cases required that the scope of the physical plant inspection in response to an employee complaint be limited to the conditions described in the complaint. *Marshall v. North American Car Co.*, 626 F.2d 320 (3d Cir. 1980); *Donovan v. Sarasota*

Concrete Co., 693 F.2d 1061 (11th Cir. 1982); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982). Others held that a non-consensual inspection of an employer's records without either a warrant or a subpoena violated the employer's 4th Amendment privacy interest in his records. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *McLaughlin v. King's Island, Division of Taft Broadcasting Co.*, 849 F.2d 990 (6th Cir. 1988); *Brock v. Emerson Electric Co., Electronic & Space Division*, 834 F.2d 994 (11th Cir. 1987). Still others approved a records inspection or imposed limitations on records sought under a warrant following an employee's complaint, but did not address the question of records sought by subpoena. *Donovan v. Burlington Northern, Inc.*, 694 F.2d 1213 (9th Cir. 1982); *Donovan v. Fall River Foundry Co. Inc.*, 712 F.2d 1103 (7th Cir. 1983); *Marshall v. W & W Steel Co., Inc.*, 604 F.2d 1322 (10th Cir. 1979). None of these cases addresses the proper scope of employee records that may be subpoenaed in an investigation triggered by an employee complaint.

We hold that the district court erred in limiting enforcement of the administrative subpoenas duces tecum issued against Trinity et al. The subpoenas fulfilled all of the requirements set out in *Morton Salt* and *Kulp*. These subpoenas were issued in connection with a limited workplace inspection following an employee complaint, but the information they seek does not have to be relevant to that particular inquiry in order to justify full enforcement. It is enough that the information sought is relevant to any inquiry that the Secretary is authorized by law to undertake. She is authorized to review the occupational health and safety records that employers are required to keep by the Act for her use, and the fact that she chooses to do

so following an employee complaint does not diminish her power to subpoena the records that she requires.

IV.

For the foregoing reasons, we will vacate the judgment of the district court and remand to the district court for full enforcement of the subpoenas duces tecum.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Table 3. Occupational injury incidence rates by industry, 1986 and 1987 — Continued

Industry[1]	SIC code[2]	Incidence rates per 100 full-time workers[3]							
		Total cases[4]		Lost workday cases		Nonfatal cases without lost workdays		Lost workdays	
		1986	1987	1986	1987	1986	1987	1986	1987
Household vacuum cleaners	3636	9.0	10.3	3.3	3.5	5.7	6.6	92.6	71.4
Sewing machines	3636	9.1	8.7	4.5	2.0	4.6	5.7	85.4	36.4
Household appliances, n.e.c.	3639	14.6	19.1	6.4	7.8	8.2	11.3	113.8	122.0
Electric lighting and wiring equipment	3640	8.8	9.0	3.7	3.9	5.0	5.1	67.2	68.3
Electric lamps	3641	6.2	7.1	2.3	2.7	8.9	4.4	43.8	57.4
Current-carrying wiring devices	3643	8.0	7.9	3.4	3.4	4.6	4.5	62.3	63.6
Noncurrent-carryng wiring devices	3644	11.2	—	5.4	—	5.9	—	106.3	—
Residential lighting fixtures	3645	10.6	11.1	4.5	4.7	6.3	6.4	73.3	70.1
Commercial lighting fixtures	3646	12.4	12.1	5.6	4.8	6.8	7.3	108.3	71.6
Vehicular lighting equipment	3647	5.7	7.2	1.7	3.6	4.0	3.6	35.5	64.8
Lighting equipment, n.e.c.	3648	9.6	9.1	4.7	3.5	4.9	5.6	50.8	55.6
Radio and TV receiving equipment	3650	7.5	6.6	3.0	2.6	4.5	4.0	52.6	43.4
Radio and TV receiving sets	3651	7.9	6.1	3.1	2.5	4.8	3.6	57.2	42.5
Phonograph records	3652	6.1	6.1	2.5	3.0	3.6	5.1	35.3	45.8
Communication equipment	3660	3.3	3.6	1.4	1.5	1.9	2.1	25.2	27.9
Telephone and telegraph apparatus	3661	3.3	3.7	1.3	1.2	2.0	2.5	24.0	24.1
Radio and TV communication equipment	3662	3.3	3.6	1.5	1.6	1.9	2.0	25.4	28.7

Table 3. Occupational injury incidence rates by industry, 1986 and 1987 — Continued

Industry[1]	SIC code[2]	Incidence rates per 100 full-time workers[3]							
		Total cases[4]		Lost workday cases		Nonfatal cases without lost workdays		Lost workdays	
		1986	1987	1986	1987	1986	1987	1986	1987
Electronic components and accessories	3670	5.0	5.5	2.1	2.3	2.9	3.2	33.4	37.3
Electron tubes, receiving type	3671	9.9	5.0	5.3	2.6	4.6	2.4	90.1	57.7
Cathode ray television picture tubes	3672	9.1	11.4	4.8	7.3	4.3	4.1	83.1	130.7
Electron tubes, transmitting	3673	6.2	4.5	2.4	2.3	3.8	2.2	40.5	45.1
Semiconductors and related devices	3674	3.5	3.8	1.4	1.5	2.0	2.3	24.2	25.1
Electronic capacitors	3675	4.3	6.9	1.5	2.3	2.8	4.6	24.6	47.0
Electronic resistors	3676	3.1	4.9	1.2	2.1	1.9	2.8	15.8	35.5
Electronic coils and transformers	3677	6.9	7.8	2.7	3.2	4.1	4.6	41.6	34.0
Electronic connectors	3678	7.3	7.7	2.6	2.9	4.6	4.8	40.6	48.0
Electronic components, n.e.c.	3679	6.0	6.5	2.6	2.7	3.4	3.8	39.3	42.6
Miscellaneous electrical equipment and supplies	3690	6.4	8.3	3.3	4.1	3.1	4.2	59.1	78.7
Storage batteries	3691	11.5	11.7	6.4	6.5	5.1	5.2	103.5	124.7
Primary batteries, dry and wet	3692	6.2	8.2	3.0	3.4	3.2	4.7	62.4	65.4
X-ray apparatus and tubes	3693	3.4	4.6	1.8	2.0	1.6	2.6	31.5	48.6
Engine electrical equipment	3694	5.4	8.3	2.7	4.0	2.7	4.2	53.2	71.7
Electrical equipment and supplies, n.e.c.	3699	9.6	11.2	4.0	5.3	5.6	6.0	64.6	110.0

Table 3. Occupational injury incidence rates by industry, 1986 and 1987 — Continued

Industry[1]	SIC code[2]	Incidence rates per 100 full-time workers[3]							
		Total cases[4]		Lost workday cases		Nonfatal cases without lost workdays		Lost workdays	
		1986	1987	1986	1987	1986	1987	1986	1987
Transportation equipment	3700	9.1	12.3	3.9	5.2	5.2	7.1	73.9	94.3
Motor vehicles and equipment	3710	9.7	13.6	4.2	5.9	5.5	7.6	73.3	96.2
Motor vehicles and car bodies	3711	7.2	11.2	3.0	5.0	4.2	6.1	50.2	84.6
Truck and bus bodies	3713	20.9	22.1	8.6	8.6	12.2	13.5	126.5	119.4
Motor vehicle parts and accessories	3714	10.0	14.3	4.3	6.2	5.6	8.0	84.6	106.4
Truck trailers	3715	21.1	20.1	11.1	9.3	10.0	10.7	156.0	140.7
Self-contained motor homes	3716	17.3	20.3	6.4	7.2	10.9	13.2	87.2	92.3
Aircraft and parts	3720	6.6	7.7	2.5	3.0	4.2	4.7	41.9	52.6
Aircraft	3721	6.3	6.8	2.0	2.5	4.3	4.3	37.2	45.5
Aircraft engines and engine parts	3724	5.1	6.5	2.7	3.2	2.5	3.4	45.1	62.6
Aircraft equipment, n.e.c.	3728	8.5	10.2	3.2	3.8	5.3	6.4	47.7	57.7
Ship and boat building and repairing	3730	20.9	31.9	10.1	13.9	10.7	18.1	238.9	302.5
Ship building and repairing	3731	20.0	37.0	10.2	16.0	9.8	21.0	265.1	375.1
Boat building and repairing	3732	23.1	21.7	10.1	9.6	13.0	12.1	173.2	155.5
Railroad equipment	3740	12.2	19.1	6.0	8.2	6.2	10.9	130.0	175.1
Motorcycles, bicycles and parts	3750	12.3	—	5.7	—	6.6	—	66.0	—
Guided missiles, space vehicles, parts	3760	2.9	3.9	1.4	1.9	1.5	2.0	27.7	31.6
Guided missiles and space vehicles	3761	2.7	3.8	1.4	2.0	1.3	1.8	29.0	34.9

See footnotes at end of table.

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No. 90-411

FILED
NOV 8 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

TRINITY INDUSTRIES, INC., ET AL., PETITIONERS

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Senior Appellate Attorney

ELLEN L. BEARD
Attorney
Department of Labor
Washington, D.C. 20210

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QUESTION PRESENTED

May the Secretary of Labor, after receiving an employee complaint of a particular safety and health violation, subpoena the employer's occupational injury and illness and related employment records in order to determine whether to seek a warrant to conduct a comprehensive plant-wide inspection?

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-411

TRINITY INDUSTRIES, INC., ET AL., PETITIONERS

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 904 F.2d 867. The order of the district court is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1990. The petition for a writ of certiorari was filed on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, "to assure so far as possible every working man and

woman in the Nation safe and healthful working conditions." 29 U.S.C. 651(b). To achieve this purpose, the Act requires employers to keep their work places free from recognized hazards likely to cause death or serious physical harm to their employees and to comply with occupational safety and health standards that the Secretary of Labor promulgates pursuant to Section 6 of the Act (29 U.S.C. 655). 29 U.S.C. 654(a). The Secretary enforces the OSH Act by issuing citations to employers that she determines, "upon inspection or investigation," have violated the Act. 29 U.S.C. 658(a). An employer may contest a citation in a formal proceeding before the Occupational Safety and Health Review Commission (29 U.S.C. 659), an independent adjudicatory body whose final orders are reviewable in the courts of appeals. 29 U.S.C. 660(a) and (b), 661.

To carry out her statutory duties, the Secretary has authority under the OSH Act to conduct inspections and investigations and to require employer recordkeeping. Section 8(a) authorizes the Secretary to enter, inspect, and investigate places of employment. See 29 U.S.C. 657(a). Unless the employer consents, such workplace inspections require a warrant based on probable cause, which may be either "specific evidence of an existing violation" or "a general administrative plan for the enforcement of the Act derived from neutral sources." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). Section 8(b) empowers the Secretary to subpoena both witnesses and evidence in connection with her inspections and investigations. 29 U.S.C. 657(b). The Secretary may enforce such subpoenas in a contempt proceeding in federal district court. *Ibid.* Section 8(c) directs the Secretary to prescribe regulations requiring em-

ployers to maintain and to make available to the Secretary accurate records of work-related deaths, injuries, and illnesses. 29 U.S.C. 657(c). The Secretary's regulations appear at 29 C.F.R. Pt. 1904. Finally, Section 8(f) gives employees and their representatives a right to request an inspection by filing a written complaint with the Secretary asserting a violation of an OSHA standard threatening physical harm or an imminent danger. See 29 U.S.C. 657(f). If the Secretary determines that the complainant has reasonable grounds, she must conduct "a special inspection in accordance with the provisions of this section as soon as practicable." 29 U.S.C. 657(f)(1).

2. On February 10, 1989, the Occupational Safety and Health Administration (OSHA) received a written complaint from an employee at petitioner Trinity's railroad car repair facility alleging that "[n]o hard hats and safety glasses [were] provided for non-production employees when walking through the shop work areas." Pet. App. A3. In response to that complaint, the Secretary obtained a warrant under Section 8(a) of the Act, 29 U.S.C. 657(a).[1] The warrant authorized an inspection of the plant limited to the conditions described in the complaint and to the examination and copying of records required to be maintained by 29 U.S.C. 657, 29 C.F.R. Pt. 1904,

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[1] The Secretary obtained a warrant at the outset because Trinity has a well-documented history of resisting OSHA inspections and investigations. *United States* v. *Trinity Indus., Inc.*, 876 F.2d 1485 (11th Cir. 1989); *Industrial Steel Prods. Co.* v. *OSHA*, 845 F.2d 1330 (5th Cir.), cert. denied, 488 U.S. 993 (1988); *Donovan* v. *Trinity Indus., Inc.*, 824 F.2d 634 (8th Cir. 1987); *Donovan* v. *Mosher Steel Co.*, 791 F.2d 1535 (11th Cir. 1986), cert. denied, 479 U.S. 1030 (1987); *Donovan* v. *Hackney, Inc.*, 769 F.2d 650 (10th Cir. 1985), cert. denied, 475 U.S. 1081 (1986).

and individual OSHA standards. Trinity refused to honor the warrant and hence neither a limited inspection of its workplace nor the examination of any records took place. Pet. App. A3-A4.[2]

On March 21, 1989, the Secretary served administrative subpoenas duces tecum on petitioner Trinity and on two of its subsidiaries, under Section 8(b) of the Act, 29 U.S.C. 657(b), requesting occupational injury and illness records previously sought in the warrant and supporting documentation such as payroll records showing the number of employees and hours worked and workers' compensation and sick leave records. When petitioners refused to honor the subpoenas, the Secretary petitioned to enforce them in district court, explaining that the information was needed to calculate petitioners' lost workday incidence (LWDI) rate. If that rate was above a specified level, the agency would, if appropriate, seek a new warrant to expand the scope of its inspection beyond the conditions described in the employee complaint to a general inspection of the workplace. Pet. App. A4-A6.[3]

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[2] The Secretary issued a citation to petitioner for having refused to produce the records as required by 29 C.F.R. 1904.7. An Occupational Safety and Health Review Commission administrative law judge later vacated the citation to the extent that it sought records beyond the scope of the employee complaint. Pet. App. A6 & n.6. That decision has now become final.

[3] OSHA's published field operations manual describes both the methodology for calculating an establishment's LWDI rate and the use of that rate in determining when to conduct a comprehensive safety inspection of the worksite. The data needed to compute the LWDI rate include the number of employee hours worked at the site and the number of injuries involving days away from work or days of restricted work activity. When OSHA receives a formal employee complaint,

The district court held that the Secretary was entitled to subpoena only records related to the employee complaint. Applying the three-part test for administrative subpoenas set out in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950), the court held that the inquiry was within the authority of the agency and the demand for production was not too indefinite. The court concluded, however, that the information sought was not "reasonably relevant to the authorized inquiry," as *Morton Salt* also requires, because—in the court's view—the "authorized inquiry" is limited to the investigation of the employee complaint. Pet. App. A6, A10-A11.

3. The Secretary appealed, and the court of appeals reversed. Pet. App. A1-A16. Applying the same *Morton Salt* standard, the court of appeals rejected the district court's narrow construction of "the authorized inquiry." *Id.* at A10-A16. It observed that OSHA was actually undertaking two separate inquiries: "The first was an inspection of the workplace, limited to the conditions described in the employee complaint. The second was a general review of the employer's health and safety records to see whether its LWDI called for a broader inspection of the workplace." *Id.* at A11. In this case, "[t]he records that the Secretary subpoenaed were reason-

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its inspection plan generally requires expanding the scope of the resulting workplace inspection to the entire establishment if the establishment's LWDI rate is at or above the Bureau of Labor Statistics' lowest average national LWDI rate for manufacturing over the past five years. C.A. App. 40, 49-52. However, a full-scope safety inspection will not usually be conducted following a complaint, even in an establishment with a high LWDI rate, if such an inspection has already been conducted in the current or two previous fiscal years.

ably relevant to the second inquiry but not to the first." *Id.* at A11-A12.

Relying on this Court's administrative subpoena decisions, the court of appeals held that the information sought by the subpoena need be relevant only to "*some* (any) inquiry that the Secretary is authorized to undertake"; it need not be relevant to the particular complaint that triggered the broader inquiry. Pet. App. A12 (citing *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501, 509 (1943)). After observing that even in the absence of an employee complaint, OSHA had an undisputed right to subpoena petitioners' documents to calculate their safety records, the court concluded that there was no reason to preclude such a subpoena following an employee complaint. Pet. App. A14. As the court explained, "[a]n employee complaint is just the sort of thing that would reasonably cause OSHA to 'take steps to inform itself as to whether there is probable violation of the law' beyond the conditions cited in the complaint." *Ibid.* (quoting *Morton Salt*, 338 U.S. at 643).

Finally, the court of appeals rejected petitioners' argument that the Secretary may not subpoena documents needed to calculate their LWDI rate because that action would expand the scope of a complaint inspection to a "wall to wall" inspection of the entire plant. Pet. App. A14. As the court explained, a subpoena for required records is "hardly equivalent" to a comprehensive plant inspection. *Ibid.* Nor does the subpoena itself trigger such an inspection. "It is the employer's own safety record that would do that." *Ibid.* Moreover, if petitioners objected to the inspection, the Secretary would still be required to obtain a warrant before inspecting the entire plant. *Ibid.* In sum, the court held that the Secretary "is

authorized to review the occupational health and safety records that employers are required to keep by the Act for her use, and the fact that she chooses to do so following an employee complaint does not diminish her power to subpoena the records that she requires." Pet. App. A15-A16.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.[4]

1. There is no question that Section 8(b) of the OSH Act, 29 U.S.C. 657(b), authorizes the Secretary to subpoena documents in connection with her inspections and investigations. As the courts below understood, "it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably

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[4] In response to an order of the district court on remand from the Third Circuit, petitioners have now supplied some, but not all, of the records sought by the Secretary's subpoenas. While the information supplied did not allow the Secretary to verify petitioners' figures, it was sufficient to compute petitioners' LWDI rate, and the Secretary does not intend to take further steps to enforce the subpoena. Accordingly, the present dispute may well be moot. See *United States* v. *Sweet*, 655 F.2d 54, 55-56 (5th Cir. 1981) (compliance with administrative subpoena renders case moot); *EEOC* v. *St. Regis Paper Co.*, 717 F.2d 1302, 1303-1304 (9th Cir. 1983) (same); but see *SEC* v. *McGoff*, 647 F.2d 185, 190 n.4 (D.C. Cir.) (compliance does not moot appeal because "the subpoenaed party may pursue a claim for relief, including return of the documents"), cert. denied, 452 U.S. 963 (1981); *FTC* v. *Browning*, 435 F.2d 96, 97-98 n.1 (D.C. Cir. 1970) (same). As we explain, *infra*, review should not be granted in any event.

relevant." *Morton Salt Co.*, 338 U.S. at 652; accord *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408 (1984) (approving administrative subpoena under Fair Labor Standards Act); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946) (same). Unlike a warrant to conduct an actual search, an administrative subpoena does not require a showing of probable cause. *United States* v. *Powell*, 379 U.S. 48, 57 (1964); *Lone Steer*, 464 U.S. at 414-415. An agency with subpoena authority "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *Morton Salt*, 338 U.S. at 642-643.

Petitioners do not challenge the applicability of the *Morton Salt* standard to administrative subpoenas under the OSH Act. Similarly, petitioners do not identify any conflict in the circuits over the use of administrative subpoenas under the OSH Act. The courts of appeals have consistently held that the Secretary may use subpoenas to obtain documents under the OSH Act, including the kinds of records at issue in this case. *McLaughlin* v. *Kings Island*, 849 F.2d 990 (6th Cir. 1988); *Brock* v. *Emerson Elec. Co.*, 834 F.2d 994 (11th Cir. 1987); *Donovan* v. *Union Packing Co.*, 714 F.2d 838 (8th Cir. 1983); *In re Kulp Foundry, Inc.*, 691 F.2d 1125, 1132 (3d Cir. 1982); cf. *McLaughlin* v. *A.B. Chance Co.*, 842 F.2d 724 (4th Cir. 1988) (Secretary need not obtain either a warrant or a subpoena for access to records an employer is required by law to maintain). The court below properly reached the same conclusion, upholding the Secretary's authority to subpoena documents necessary to evaluate petitioners' overall safety record and—depending on the result—the need to conduct further inspections of the workplace.

Petitioners contend, however, that those particular subpoenas should be treated differently because they were issued following the Secretary's receipt of an employee complaint. In petitioners' view (Pet. 9-11), the Secretary should not be allowed to use an administrative subpoena under Section 8(b) of the Act (even for required records under Section 8(c)) to obtain evidence that could serve to expand the scope of a complaint inspection. See Pet. 9-10. They contend that issuance of a subpoena under these circumstances would be "an 'end run' around the limitations of § 8(f) of the Act, the Fourth Amendment, and the Court's holding in *Barlow's*" requiring probable cause based on a neutral administrative plan to justify a comprehensive plant inspection. *Id.* at 10-11.

In essence, petitioners argue that warrant standards should apply to a subpoena whenever the information sought by the subpoena might lead to a future warrant application. However, petitioners cite no authority for this novel proposition. This Court rejected similar reasoning in *Lone Steer*, where it held that the standards for issuing subpoenas in *Oklahoma Press* and *Morton Salt*, rather than the warrant requirement set forth in *Barlow's*, govern the Secretary's subpoena of an employer's payroll records under the Fair Labor Standards Act. 464 U.S. at 414-415. Petitioners attempt (Pet. 12) to distinguish *Lone Steer* on the basis that the subpoena there did not require "entry." The subpoena in this case, however, similarly does not require on-site inspection. And in *Lone Steer*, no less than here, the records review could have led to a later inspection of the premises. See 464 U.S. at 415-416. Cf. *Union Packing Co.*, 714 F.2d at 841-842 (*Barlow's* does not apply to use of subpoena to obtain records

in "programmed" inspection to determine whether to conduct comprehensive physical search of establishment).

Petitioners' statutory arguments are also unpersuasive. Nothing in the language of Section 8 of the OSH Act suggests that the Secretary's subpoena power under Section 8(b) is limited in any way by Section 8(f), which concerns employee complaints. Rather, Section 8(b) broadly authorizes the Secretary to utilize subpoenas "[i]n making his inspections and investigations under this chapter." 29 U.S.C. 657(b). Section 8(f) addresses a different subject: it gives employees a right to request an OSHA inspection and imposes on the Secretary a duty to investigate reasonable employee complaints. See 29 U.S.C. 657(f). Thus, as the court of appeals observed, the case law discussed by petitioners (Pet. 8-9) regarding the proper scope of a complaint inspection or a warrant under Section 8(f) simply has no bearing on the Secretary's subpoena power under Section 8(b). That power is governed solely by the *Morton Salt* standard. See Pet. App. A14-A15.

2. Petitioners characterize the question in this case as whether the Secretary "may expand limited scope complaint inspections under [Section 8(f) of the Act] into comprehensive plant-wide inspections under [Section 8(a)] without first demonstrating that the establishment was selected for inspection based on a reasonable administrative inspection plan, as required by [*Barlow's*]." Pet. i. That characterization is inaccurate. The Secretary has neither attempted to conduct a plant-wide inspection of petitioners' premises nor applied for a warrant to do so; certainly the court below did not authorize such an inspection nor issue such a warrant. Cf. *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163 (1967) (case

is not ripe when "[a]t this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order"). Instead, the Secretary sought only to subpoena the occupational injury and illness records needed to determine *whether* to seek a warrant for a broader inspection of petitioners' premises.

The present subpoena was thus the second step of OSHA's investigatory procedure in this case. The first step was the warrant to conduct a limited-scope complaint inspection; the second step was the request for records to determine the employer's overall safety record;[5] and the third step—which remains hypothetical—is a possible full-scope or "wall-to-wall" inspection.[6] An employer is protected at steps one and three by the *Barlow's* warrant requirement, and is protected at step two by the *Morton Salt* subpoena requirement. Petitioners are not entitled, however, to the protections of step three when that step has not and may never be reached. As the appeals court stated, ordering an employer to produce required records for the Secretary's inspection "is hardly equivalent to undertaking a comprehensive plant inspection: requiring the production of the documents does not even, by itself, trigger such an inspection. It is the employer's own safety record that would do that" (Pet. App. A14)—but only after the Secretary

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[5] As the court of appeals noted (Pet. App. A8), this case does not involve the proper scope of inspection of records pursuant to the warrant issued at the first step. The request here was made in separate administrative subpoenas.

[6] Alternatively, the Secretary might seek an intermediate-scope inspection if steps one and two reveal, for example, specific evidence of potential OSHA violations in a particular area of the plant, or a pattern of similar employee injuries.

has reviewed the records and determined, based on criteria established in her neutral administrative plan, to undertake a broader inspection. *Ibid.* Even then, "[i]f [petitioners] did not consent to a broader inspection of the workplace, the Secretary would have to obtain a warrant." *Ibid.*

Moreover, in cases where this third step was reached, the courts of appeals have approved OSHA's use of LWDI rates to expand a complaint inspection to a comprehensive or "wall-to-wall" safety inspection in a high-hazard industry. *In re Cerro Copper Products Co.*, 752 F.2d 280 (7th Cir. 1985); *In re Carondelet Coke Corp.*, 741 F.2d 172 (8th Cir. 1984). In each of those cases, the court quite reasonably held that an employer's LWDI rate was a relevant factor in deciding whether to grant a warrant for a full-scope inspection under *Barlow's*. As one court has explained, "[w]ithout preliminary information such as a company's lost workday injury and illness rate, it would be difficult for the Secretary to develop a plan with neutral criteria which could be used to select a workplace for inspection." *Union Packing Co.*, 714 F.2d at 841. Thus, even if petitioners' "question presented" were ripe for review, there is no conflict in the circuits and no other reason for this Court to review an issue that the lower courts have correctly addressed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT P. DAVIS
Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

NATHANIEL I. SPILLER
Senior Appellate Attorney

ELLEN L. BEARD
Attorney
Department of Labor

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